UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 83
Number 5 *Locating the Constitutional Center, Centrist Judges and Mainstream Values: A Multidisciplinary Exploration*

Article 8

6-1-2005

Grand Centrism and the Centrist Judicial Personam

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GRAND CENTRISM AND THE CENTRIST JUDICIAL PERSONAM

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INTRODUCTION

Is Anthony M. Kennedy the consummate centrist on the Rehnquist Court?

That cannot be, you say, because everybody knows that Sandra Day O'Connor deserves the distinction.[1] Justice O'Connor is the exemplary practitioner of the style of judging that likely comes to mind most often when Court watchers and constitutional law *cognoscenti* allude to judicial centrism—what I will call here, with no claim to originality and a standing reference to the work of Cass

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1. *See, e.g.*, Nancy Maveety, *Justice Sandra Day O'Connor: Accommodationism and Conservatism*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 114–15 (Earl M. Maltz ed., 2003) (discussing Justice O'Connor's behavioral and jurisprudential accommodationism with a conservative cast; noting that "[s]he leans toward conservative policy outcomes ... but she does not derive the reasons or justifications for those outcomes from conservative ideological or interpretive principles," instead adopting a contextual accommodationist approach to judging) (emphasis omitted).

Sunstein, "minimalist centrism."[2] If minimalist centrism is what centrism on the Supreme Court is all about, placing any other name in nomination is an empty gesture indeed. Others on the Court do minimalist centrism—Sunstein has said that Justices Kennedy, Souter, Ginsburg, and Breyer engage in versions of it from time to time[3]—but no one does it more frequently and more notably than Justice O'Connor.

What makes Justice Kennedy's case for recognition intriguing is that it challenges us to acknowledge a different and bolder brand of centrism that we overlook and by predisposition are resistant to appreciate for its centrist qualities. In major cases raising questions of liberty and freedom, Justice Kennedy practices and preaches what I will be calling a "grand centrism"—a jurisprudence whose project is the self-conscious maintenance of public faith in a substantive constitutional center of clean, simple, shared American values. It is a jurisprudence that holds that there *are* such shared American values, that constitutional adjudication *can* be guided by them, and that the Supreme Court *must* nurture them and keep them popularly accessible, which means not only extolling them but ensuring that the potentially distorting influences of legal doctrine and judicial restraint are kept in check.

Justice Kennedy's case for recognition is made all the more intriguing because grand centrism is only a part of his story. In the other cases that have loomed most prominent on the Court's docket during Justice Kennedy's tenure, those involving federalism and national power, he engages in a different brand of centrism. There he seeks a position that stands on principle but avoids the extremism that besets competing frameworks for decision advanced by his colleagues on the Court. It is a posture that some might see as minimalist centrism of a piece with Justice O'Connor's, but it is distinctive enough a variant to merit its own recognition. I will call it "conceptual moderation." When grand centrism and conceptual moderation are combined, they produce a distinctive centrist judicial personam that taps multiple cultural and political veins to fortify its centrist credentials.

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2. For his works on the subject, see generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, JUDICIAL MINIMALISM]; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996).

3. *See* SUNSTEIN, JUDICIAL MINIMALISM, *supra* note 2, at 9.

I. MINIMALIST CENTRISM

Before turning to the specifics of Justice Kennedy's centrism, let us first take quick stock of the kind of judicial behavior most often recognized as centrist today. The philosopher Alasdair McIntyre had Justice Lewis F. Powell and the *Bakke*[4] decision in mind, but his characterization captures the ethos of the minimalist centrism that has achieved prominence in recent years. "[O]ne function of the Supreme Court must be to keep the peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications," McIntyre wrote.[5] To fulfill that function, the Court "play[s] the role of a peacemaking or truce-keeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none."[6]

There you have the motivational wellspring of minimalist centrism as currently ministered by its leading practitioner, Justice Sandra Day O'Connor. For the minimalist centrist, many of the defining cases of our times—cases about abortion, gay rights, and affirmative action, for example—involve sharp, broad-based, and seemingly intractable social conflict that the Supreme Court (and an ideologically divided Supreme Court, no less) cannot hope to resolve by appeal to a compelling, controlling principle. The strife is too great, the principles too contestable and subsumable by the strife itself. And so constitutional adjudication, much like diplomacy, should set out to defuse the current skirmish on narrow terms that offer a measure of assuagement to all sides and afford the Court ample latitude to respond with similar inventiveness in future cases. Insofar as its objective is the ascertainment of an accommodation point somewhere between or amid the clashing social forces, the approach projects an appreciable centrist quality. Its reliance on narrow terms of resolution, both to facilitate short-term peace and to preserve judicial options down the line, lends the approach its minimalist cast.

The incidents of such a minimalist jurisprudence have been extensively developed and defended by Cass Sunstein in his work on incompletely theorized agreements and judicial minimalism.[7] Here I merely wish to raise a contrasting backdrop to help highlight Justice

4. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
5. ALASDAIR MCINTYRE, AFTER VIRTUE 253 (2d ed. 1984).
6. *Id.*
7. *See* sources cited *supra* note 2.

Kennedy's distinctive contributions to centrism, and so it suffices to note four familiar features of minimalist centrism manifested in Justice O'Connor's pivotal opinions for the Court. These four features together make up the minimalist centrist's essential toolkit, instruments that work together to ascertain the requisite accommodation point and ensure the requisite minimalism. The first feature is a close adherence to case-specific context that maximizes the identification of points and considerations that may be employed to construct a centrist and narrow resolution.[8] The second is a preference for temporalizing maneuvers that permit decisions on socially controversial grounds to be deferred.[9] The third is a predilection for doctrinal innovations that make standards of review more commodious, thereby facilitating more tightly contextual accommodations and compromises.[10] The fourth feature is a reliance on rhetoric that presents the Court's decisions as moderate, centrist outcomes that respect and give fair weight to all legitimate competing interests, without undue favor to any side in the social conflict.[11]

No amount of praise for these features and their significant accomplishments can ever refute the basic criticism that minimalist centrism faces. As Charles Fried recently charged, minimalist centrism in the fashion of Justice O'Connor produces a sense of "doctrinal drift" and portends "an indefinite and incoherent prolongation of a fin-de-siècle jurisprudence, where the court serves

8. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (upholding an affirmative action admissions plan at a state-supported law school because, rather than employing a quota system, the law school "engage[d] in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment").

9. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment) (preferring to invalidate the Texas anti-sodomy statute on equal protection rather than substantive due process grounds and thereby deferring consideration of liberty questions).

10. *See, e.g.*, *Grutter*, 539 U.S. at 326 (applying strict scrutiny standard that is not "fatal-in-fact"); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 858–61 (1992) (rejecting the strict scrutiny standard for abortion regulation advanced in *Roe v. Wade*, 410 U.S. 113 (1973), and adopting the more flexible undue burden standard that Justice O'Connor advanced in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)). *See generally* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002) (detailing the Court's development of a new regime of judicial scrutiny that affords more flexibility of response).

11. *See, e.g.*, *Grutter*, 539 U.S. at 341–43 (portraying the Court's endorsement of affirmative action in higher education as temporary and hence respectful of the interests of critics); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating a state affirmative action program designed to benefit minority contractors, but assuring states that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion").

as nothing more than an ad hoc arbiter of issues it finds too difficult to decide in a principled way."[12] As Sunstein has strived to demonstrate, minimalist centrism can proceed *toward* principles that in time might command broad allegiance as shared values.[13] But those who expect their constitutional jurisprudence to proceed forthrightly and confidently *from* such principles will not find minimalist centrism suitable to their tastes.

II. SHARED VALUES: THE CONSTITUTIONAL CENTER OF SUBSTANTIVE CONTENT

Minimalist centrism's uneasy relationship with the idea of shared values merits further attention, for it is on precisely this point that Justice Kennedy's brand of centrism distinguishes itself.

By McIntyre's account, minimalist centrism's relationship with the idea of shared values is one of denial and resignation. The finessing of conflict, rather than the invocation of shared first principles, marks the centrist jurist's function because there are no shared values to invoke: "[O]ur society as a whole has none."[14] And perhaps that is the case. Sanford Levinson raised the central question—the pun is intended—in his meditation on the Constitution's bicentennial, *Constitutional Faith*.[15] Americans like to regard their Constitution as the "central sacred text of our civil religion," the repository of "shared values" to which we pledge a "bonding commitment."[16] But "[i]s it possible," Levinson asked, "that the national covenant is without content, or is at least unspecifiable?"[17] It was with no sense of joy that Levinson reported his conclusion. The search for a constitutional center of substance—a "propositional Constitution" upon which there is consensus—is "chimerical," he wrote.[18] The Constitution is a "model instance" of what philosophers label an "essentially contested concept" that will be the subject of endless disputation.[19] What is more (and worse),

12. *See* Charles Fried, Editorial, *Courting Confusion*, N.Y. TIMES, Oct. 21, 2004, at A29; *see also* Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1835 (2004) (arguing that minimalism's emphasis on restricting judicial power downplays the importance of legal principles).

13. *See* SUNSTEIN, JUDICIAL MINIMALISM, *supra* note 2, at 61–72.

14. *See* MCINTYRE, *supra* note 5, at 253.

15. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

16. *Id.* at 120–21.

17. *Id.* at 125.

18. *Id.* at 141.

19. *Id.* at 124 (citing WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE

"the very fact that the disputants believe that they are joined by allegiance to a given concept may make the disputes more bitter than those between recognized antagonists. Betrayal of ostensibly shared visions almost always generates greater animosity than the opposition of forthrightly identified opponents."[20] The Constitution "is as likely to set the stage for disputation as to end it."[21] All the same, Levinson felt it right to lend his name to the Constitution in support of the project it holds forth. It provides as good a discourse, as useful a rhetorical system, as we have available for engaging in our disputation over the political and social visions we believe best depict the nation's past, present, and future.[22] A "limited constitutional faith"—a commitment to "a process of becoming and to taking responsibility for constructing the political vision toward which I strive, joined, I hope, with others"—is warranted.[23]

Affirming Levinson's hope in the "process of becoming," Jefferson Powell asserts that claims like McIntyre's that "American constitutional law is empty at its center"[24] are wrong because they miss the yield of a "history of constitutional discussion" in this country.[25] Powell identifies twenty propositions or themes that are "common ground for contemporary constitutional debate."[26] In his own words:

> (1) No political or social dispute—none, not any, not ever—is to be resolved by military means.[27]

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10 (2d ed. 1983), and W.B. Gallie, *Essentially Contested Concepts*, *in* THE IMPORTANCE OF LANGUAGE 123 (Max Black, ed. 1962)).

20. *Id.* at 125.

21. *Id.* at 153–54.

22. *Id.* at 192.

23. *Id.* at 193. Levinson admitted to great difficulty in making this commitment given the Constitution's pro-slavery provisions. He arrived at his profession of faith thanks to the inspiration of Frederick Douglass, whose "ability to speak in the terms of the Constitution—and to stretch the sense of constitutional possibility"—exemplified "the possibilities present in the discourse." *Id.* at 192.

The calculation has changed for Levinson since he published *Constitutional Faith* in 1988. The 2000 electoral controversy has highlighted for him certain intolerable deficiencies in the document that so hinder democracy as to require rejection. *See* Sanford Levinson, *Why I Did Not Sign the Constitution: With a Chance to Endorse It, I Had to Decline*, FINDLAW, Sept. 23, 2003, *at* http://writ.news.findlaw.com/commentary/20030923_levinson.html (on file with the North Carolina Law Review).

24. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 205 (2002).

25. *Id.* at 203.

26. *Id.*

27. *Id.* at 205 (emphasis omitted).

(2) The electoral processes ordained for selecting the president and members of Congress must be followed regardless of circumstance or consequence.[28]

(3) Each and every action of the federal government, its branches, its components, its officers and its agents must be authorized by the Constitution.[29]

(4) With exceptions relating to the federal government, the state governments need not demonstrate that their actions are authorized by the Constitution.[30]

(5) The federal government is not omnicompetent.[31]

(6) State governments and state officers must obey federal rules of law and federal commands that are consistent with the Constitution.[32]

(7) The exercise of constitutionally authorized (or permitted) powers is subordinate to constitutional prohibitions and guarantees of individual liberty: in short, constitutional rights trump constitutional powers.[33]

(8) Some constitutional rights are absolute; some are not, and their scope is defined in part with respect to social need.[34]

(9) As a matter of constitutional law, American executive officers must obey judicial orders, at least once affirmed at the highest level.[35]

(10) As a matter of constitutional morality, American legislatures ought to respect settled judicial views about the meaning of the Constitution, unless they undertake the task of

28. *Id.* (emphasis omitted). The principle is confirmed, Powell adds, by the 2000 electoral controversy, which never presented a "serious danger that the ultimate outcome of the process would be set aside by military or other unconstitutional means." *Id.* at 238 n.3.

29. *Id.* at 205 (emphasis omitted). "This principle brings with it a necessary corollary: *There are no extraconstitutional sources of federal power.*" *Id.*

30. *Id.* at 206 (emphasis omitted).

31. *Id.* (emphasis omitted).

32. *Id.* (emphasis omitted).

33. *Id.* (emphasis omitted).

34. *Id.* at 207 (emphasis omitted).

35. *Id.* (emphasis omitted).

amending the Constitution.[36]

(11) The judiciary is not infallible; therefore, the people and the political branches of the federal government ought to take appropriate steps to change the constitutional views of the judiciary, when they believe the courts have erred, through constitutional amendment, litigation, and the appointments process.[37]

(12) The Constitution assigns the resolution of some constitutional questions to the political branches of the federal government; therefore, the judiciary must abstain from addressing these questions.[38]

(13) There are no (federal) extraconstitutional sources of legal limitation on the political branches or the states; therefore, a court exercising the power of judicial review under federal law must invoke a rule of law ultimately derived from the Constitution.[39]

(14) In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution.[40]

(15) The Constitution is a practical instrument of governance; its grants of power and its guarantees of individual liberty are to be construed, to the extent reasonably possible, to create a coherent political system capable of achieving the goals stated in its preamble.[41]

(16) The Congress is constitutionally authorized to regulate the national economy.[42]

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36. *Id.* (emphasis omitted).
37. *Id.* (emphasis omitted).
38. *Id.* at 208 (emphasis omitted).
39. *Id.* (emphasis omitted).
40. *Id.* (emphasis omitted). The principle has two corollaries: "*The Constitution does not ordain a fixed set of legitimate forms of argument*" and "*[t]he Constitution does not ordain a particular moral or political theory.*" *Id.* at 209.
41. *Id.* at 209 (emphasis omitted).
42. *Id.* (emphasis omitted).

(17) American governments must respect an extremely broad realm of free expression.[43]

(18) American governments must not compel religious or—save in fairly rare circumstances—political expression.[44]

(19) American governments must not enforce or condone racial caste.[45]

(20) American governments must obey judicially defined processes when they inflict (at least many forms of) injury on individuals.[46]

Powell's vision of the American constitutional center is a pragmatic one. The values located there achieved their centrality not because they are shared by all beyond all objection. Rather, they are practical postulates that the large majority of disputants are willing (often unconsciously) to accept as the framework for meaningful contemporary engagement of constitutional disputes. This center of principles emerged from a long history of constitutional debate in courts and, critically and not to be overlooked, in politics. Its content accordingly has changed and can change as new debates arise and unfold:

> [T]he principles that seem agreed upon at one point may always be narrowed, transformed, or (infrequently) repudiated at a later time. But the longer a principle is accepted, the more difficult its repudiation, both because it becomes part of the bedrock assumptions that all constitutionalists bring to the task, and because the practical implications of repudiation become extremely weighty.[47]

Powell is not alone in urging a picture of an American constitutional center of shared values. Cass Sunstein identifies ten basic substantive commitments that enjoy broad acceptance by people otherwise divergent in their views on matters of politics and the role of the courts. Sunstein's list is shorter than Powell's because he sets aside structural considerations and confines his attention to principles bearing directly on individual rights. The ten, in Sunstein's words:

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43. *Id.* (emphasis omitted).
44. *Id.* (emphasis omitted).
45. *Id.* at 210 (emphasis omitted).
46. *Id.* (emphasis omitted).
47. *Id.* at 204.

(1) Protection against unauthorized imprisonment. . . .

(2) Protection of political dissent. . . .

(3) The right to vote. . . .

(4) Religious liberty. . . .

(5) Protection against physical invasion of property. . . .

(6) Protection against police abuse of person or property. . . .

(7) The rule of law. . . .

(a) Clear, general, publicly accessible rules of criminal law laid down in advance. . . .

(b) Prospectivity, no retroactivity. . . .

(c) Official conformity to law; relationship between law on the books and law in the world. . . .

(d) Hearing rights and availability of review by independent adjudicative officials. . . .

(8) No torture, murder, or physical abuse by the government . . . .

(9) Protection against slavery or subordination on the basis of race or sex. . . .

(10) Substantive protection of the human body against government invasion.[48]

Daniel Farber and Suzanna Sherry likewise see a constitutional center with substantive content. They point to eight "basic ideas and principles of constitutional law . . . that most Americans—including most lawyers—would endorse."[49] The list of eight, in Farber and Sherry's words:

(1) The Constitution is a written document, drafted in 1787 and

48. *See* SUNSTEIN, JUDICIAL MINIMALISM, *supra* note 2, at 64–67 (emphasis omitted).

49. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 2 (2002).

ratified in 1789, with important amendments soon thereafter adding the Bill of Rights, and other important amendments added in the wake of the Civil War (as well as at other times).

(2) The Supreme Court is in charge of enforcing the Constitution. Its job is to follow the law, not to bow to public opinion or to implement the personal values of the justices. In general, interpretation should begin with the meaning the words conveyed to those who wrote and ratified the various parts of it ("the framers" or "the founding generation").

(3) The Constitution can only be changed through the formal, cumbersome process of amendment, specified in Article V.

(4) The Supreme Court's rulings are law, and must be followed by other judges and government officials as well as by ordinary citizens.

(5) Under the Constitution, the federal government has the power to legislate on a broad range of subjects, including health and the environment, workplace conditions and discrimination, drugs, and organized crime.

(6) It is unconstitutional for either the federal or state governments to engage in racial segregation or to deliberately discriminate against women or racial or ethnic minorities.

(7) The Constitution envisions states not merely as regional offices of the federal government but as possessing their own separate sovereignty. However, both states and the federal government must respect freedom of speech, refrain from unconstitutional searches, respect the right to remain silent, and so forth.

(8) It would violate the Constitution—or so most people assume—for the government to assign spouses to people or to dictate their family size, to require them to get abortions, to deprive them of custody of their children arbitrarily, or to force them to submit to sterilization.[50]

There are similarities as well as differences in these accounts from Powell, Sunstein, and Farber and Sherry, both as to the content identified as central and as to the operational significance of the

50. *See id.* at 2–3.

principles so identified. For our purposes, what is important is what the existence of these lists establishes. One can have more than ample regard for the contestability of constitutional assertions, their historical contingency, and their limited capacity to determine conclusions—in short, one can be a cosmopolitan constitutional lawyer, attuned to the postmodern—and nonetheless believe in and articulate "a set of shared constitutional first principles."[51] With time, some of that set's content may come and some may go. Moreover, the significance of that content for the resolution of today's disputes—the question of application, of concept on the one hand and conception on the other—can evoke disagreement and may be complicated or subsumed by the social forces that fuel those disputes. Yet it still remains sensible, meaningful, and useful to say that there is a constitutional center with appreciable substantive content—a center of common ground, of foundational precepts or propositions, of core understandings that provide the gravitational force that holds our polity together and permits us to disagree strongly but peacefully and with the promise of resolution in accordance with principle.

On that score, I have a suspicion that the cosmopolitan constitutional lawyer is, if anything, more grudging in the acknowledgment of such a center than the average American. Indeed, I would wager that it is precisely *this* conception of a set of shared values—and not any set of ideas corresponding to minimalist centrism—that would spring naturally to the mind of the average American who heard us pose the question of what it means to talk of the center in matters of constitutional law. If the average American thinks that way, it is a reassuring validation that the constitutional canon can both inform and reflect the public's conscience. Consider that most canonical of twentieth century constitutional cases, *Brown v. Board of Education*.[52] As students of the Constitution know, there are two *Brown*s. One, the *Brown II* of 1955 whose fiftieth anniversary will not be widely celebrated this year, responded to the intractability of social conflict with temporalizing accommodations made famous by the now epigrammatical phrase "all deliberate speed."[53] It is the lawyer's *Brown*, and a minimalist centrist's cut at that. The other *Brown*, the *Brown I* of 1954, is the *Brown* that is celebrated somewhere in the nation every day for having summoned a core constitutional truth that ratiocinations had sought to obscure

51. *See* POWELL, *supra* note 24, at 205.
52. 347 U.S. 483 (1954).
53. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

since the nation's founding. The opinion itself may be an incompletely theorized agreement, but the case lives in the public eye as a monument to our capacity to tap a constitutional center of core values.

We now can appreciate better the uneasiness of minimalist centrism's relationship with the idea of shared values. For those who doubt the existence of shared values in our society, a jurisprudence of accommodation and temporalizing, of maneuvers to finesse social conflict with truce terms that give each side a measure of satisfaction, is the logical terminus for the judicial centrist. Such a jurisprudence also serves as the strategic percentage play for anyone who believes there is a constitutional center of content but doubts the judiciary's capacity to confidently and competently summon that center to resolve conflicts. Those doubts, of course, have a considerable pedigree. Long before indeterminacy became a household word in constitutional law and the contestability of truth claims became second-nature, the thought that Justices could summon the center had been undermined by generations of lawyers, jurists, and scholars. From Thayer,[54] to Bickel,[55] to Ely,[56] to Sunstein today,[57] a root skepticism of the judicial capacity to work directly with such stuff has been a constant theme. *Political leaders* may be bold enough to appeal directly to the center, but the judge who does so flirts too openly with unmitigated countermajoritarianism and the impermissible assertion of subjective will. In the vernacular, the judge who summons the center is begging to be taken to task for activism, a quality that easily can be postulated as antithetical to centrism once you have assumed that centrism means finding some appeasing midpoint between clashing forces in a conflict. To be a centrist Justice, it thus seems, you had best put any notion of a *constitutional* center out of your mind and focus your thoughts instead on the business of quelling and abating strife. Any judicial relations with a constitutional center of content must be indirect, mediated

54. *See generally* James B. Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that courts should exercise the power of judicial review with great caution and intervene only in cases of clear error).

55. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986) (arguing that the "countermajoritarian difficulty" presented by an unelected judiciary is best countered by judges exhibiting the "passive virtues").

56. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that judicial review is best justified when limited to reinforcing democratic values).

57. *See generally* SUNSTEIN, JUDICIAL MINIMALISM, *supra* note 2 (urging judges to avoid deciding cases based on broad principles and to leave as much open for democratic decisionmaking as possible by resolving cases on narrow grounds).

through legal doctrine and conventions of argument that reflect longstanding cultural skepticism of the Court as a fully competent steward of the Constitution in its full capacity.[58]

III. SUMMONING THE CONSTITUTIONAL CENTER: JUSTICE KENNEDY'S GRAND CENTRISM

Justice Kennedy presents the alternative for those who believe in a constitutional center of content, turning the skepticism away from judges and directing it instead toward the consequences of a jurisprudence that is reluctant to profess its faith in shared values. Although there are instances when Justice Kennedy is drawn to the ways of minimalist centrism,[59] several of the moments for which history will remember him best involve exercises of a different brand of centrism altogether. I am speaking of his liberty-affirming opinions in cases such as *Lawrence v. Texas*,[60] *Planned Parenthood v. Casey*,[61] *Romer v. Evans*,[62] *Texas v. Johnson*,[63] *Lee v. Weisman*,[64] and *Chavez v. Martinez*.[65] What makes these moments distinctive is Justice Kennedy's treatment of them as occasions that demand a direct, unmediated appeal to the constitutional center and the simple, shared truths it contains. In Justice Kennedy's view, the center exists and must hold, but it cannot hold unless the expositions of constitutional interpretation keep the ideal of the center plainly in sight. The good constitutional steward therefore must be willing to

58. For a now-classic discussion of how doubts about the judicial role may inhibit constitutional interpretations and leave constitutional content untapped, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). *See also* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 33–34 (explaining that when the Supreme Court decides cases in a narrow fashion, it often implicitly legitimates governmental action that the decisions themselves leave untouched).

59. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting) (arguing that the law school's concept of "critical mass" is inconsistent with the individual consideration necessary for a race-conscious law school admissions program to survive strict scrutiny); Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (limiting the holding to the particular circumstances of the case on account of the "many complexities" inherent in voting rights cases); Stenberg v. Carhart, 530 U.S. 914, 956–80 (2000) (Kennedy, J., dissenting) (accusing the Court of interfering too broadly with the state's right to regulate abortion and favoring doctrinal devices that facilitate the assertion of the state's interests).

60. 539 U.S. 558 (2003).

61. 505 U.S. 833 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

62. 517 U.S. 620 (1996).

63. 491 U.S. 397 (1989).

64. 505 U.S. 577 (1992).

65. 538 U.S. 760, 789–99 (2003) (Kennedy, J., concurring in part and dissenting in part).

transcend the thick complexities and fine niceties of legal argument when they threaten to obscure the People's vision of a clear constitutional center or confound the accessibility of its content. Judges are competent to summon the center and should do so with confidence precisely because we need it to be so, because in our constitutional culture as it has evolved it is a responsibility of stewardship that none other than judges can be expected to discharge.

Let us call this "grand centrism." It deserves the centrist label even though it is a far cry from the accommodating and temporalizing we commonly associate with a judicial centrist these days. It is quite literally centrist because it is fixated on—indeed, its ethos is—the essentiality of a constitutional center with approachable content that has long-run legitimating power and immediate justificatory power as well. It insists that some social clashes *can* be resolved in the name of shared values and *must* be resolved in that manner if the public is to enjoy an enduring connection with and common commitment to the Constitution. The unconventionality of its method does not rob the approach of its centrist aspirations and quality; its different orientation and style only make it "grand" as opposed to "minimalist." Minimalist centrism works a contextually and temporally confined tableau; Kennedy's grand centrism broadens the context and spans time. Minimalist centrism presses legal argument to make space for the short-term defusing of controversy by accommodation; Kennedy's grand centrism transcends doctrine to seek resolution by and reaffirmation of simple, pure principles. Minimalist centrism manufactures a midpoint of compromise; Kennedy's grand centrism enforces a center of values uncompromisingly. Minimalist centrism sells its dispositions with rhetoric to placate the disputants of the day and assure them that their interests have not been dashed and that the Court has no side to champion; Kennedy's grand centrism employs a rhetoric of intergenerational responsibility and personal sacrifice to rally the disputants to adhere to basic principles that the Court must maintain for the benefit of all. Kennedy's centrism is grand for its aspiration, its sweeping vision, its transcendence of legal discourse, and its high-spirited rhetoric—which may mean that it is also grand because it is audaciously ambitious.

Such is grand centrism by way of general introduction. Let us look at it a bit more closely from two perspectives. Consider the logic that structures it and the rhetoric that carries it into execution.

A. *The Logic of Grand Centrism*

The starting point for understanding the logic of Justice Kennedy's grand centrism can be found in his concurring opinion in *Texas v. Johnson*,[66] the flag burning decision. We live, he wrote, "in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics."[67] As the context makes clear, Justice Kennedy does not regard this cultural observation as a cause for celebration or resignation. It identifies a condition we must rise to resist. There is nothing wrong with absolutes and simple truths by Justice Kennedy's lights, nothing naive or embarrassing about believing in them. What is to be rued is the weakness of spirit and lost resolve that causes one to doubt their existence and value or to saddle them with defensive annotations that undermine their clarity and command.

When you think about it, Justice Kennedy is speaking of challenges to faith—in Sanford Levinson's words, "[t]he crisis in a faith system [that] occurs when there is no longer agreement on what counts as a 'center,' 'essence,' or 'foundation' that must be preserved at the necessary cost of sacrificing more peripheral values."[68] Faith in simple shared values is made difficult by our times, but for Justice Kennedy it remains viable. The American flag still "holds a lonely place of honor"[69] in an age like ours because it successfully symbolizes commonly held principles; it is a "constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit."[70] The Constitution enjoys a similar status in Justice Kennedy's America. "[The] Constitution survives over time," he wrote, "because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom."[71] The descriptive point leads to prescriptions as well. Faith is not only viable, it is vital. The Constitution contains "pure command[s]" at its core which its leading interpreters, the Justices of the Supreme Court, must honor as commands and maintain as pure.[72] Simplicity in the articulation and

66. 491 U.S. 397, 399 (1989) (holding that a ban on flag desecration violates the First Amendment).

67. *Id.* at 421 (Kennedy, J., concurring).

68. LEVINSON, *supra* note 15, at 153.

69. *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring).

70. *Id.* (Kennedy, J., concurring).

71. Chavez v. Martinez, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part).

72. *See Johnson*, 491 U.S. at 420 (Kennedy, J., concurring).

application of those principles is essential to their popular accessibility, which in turn is essential to their status as shared, all of which in turn is essential to the Constitution's ability to fulfill for each generation its "own promise, the promise of liberty."[73] Those quoted words about promise—authored by Justice Kennedy[74]—come from the conclusion of the joint opinion in *Planned Parenthood v. Casey*,[75] and they were preceded by a concise proclamation of the role of a living faith in the Constitution's project: "Our Constitution is a *covenant* running from the first generation of Americans to us, and then to future generations. It is a *coherent succession.* Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one."[76]

Popular belief in a constitutional center of shared ideas and aspirations, carried from one generation to the next: that is the key article of the constitutional faith that Justice Kennedy consistently preaches in the cases that test liberty's meaning for our times. The implications for judicial review are eye-opening for constitutionalists schooled in the wary ways of restraint. As the ultimate expositors of the Constitution, the Justices must be at least as wary of restraint's ways, lest they let their lawyerly inclinations deprive them of their standing as keepers of the faith and ministers to the faithful. Legalistic qualifications and specifications can cloud the center and disrupt the process of coherent succession by problematizing the center's content, obscuring it from popular view, and undermining the Court's capacity to inspire faith and engagement. That is why the "powerful arguments" made on behalf of the criminalization of flag burning had to be rejected in *Texas v. Johnson*[77] and why the adroit rejoinders of the dissenters in *Lee v. Weisman*[78] had to be resisted as well. "To compromise [a core] principle today," Justice Kennedy warned in *Lee*, "is to deny our own tradition and forfeit our standing

73. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 901 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

74. *See* MARK TUSHNET, A COURT DIVIDED 215 (2005) (attributing the closing sentences of *Casey* to Justice Kennedy).

75. 505 U.S. 833, 846, 876 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (preserving the "essential holding" of *Roe v. Wade* and announcing that restrictions on abortion are invalid only if they impose an "undue burden" on the right to choose).

76. *Id.* at 901 (opinion of O'Connor, Kennedy, and Souter, JJ.) (emphases added).

77. 491 U.S. 397 (1989).

78. 505 U.S. 577, 632, 644–46 (1992) (Scalia, J., dissenting) (criticizing Justice Kennedy's opinion for the Court for ignoring the historical understandings of the Establishment Clause).

to urge others to secure the protections of that tradition for themselves."[79] It also is why *Bowers v. Hardwick*[80] had to be purged from the pages rather than distinguished on the equal protection grounds that the minimalist Justice O'Connor thought sufficient to tide things over.[81] *Hardwick* defiled the simple ideal of liberty when it employed the legal modes of due process analysis to credit "powerful voices [that] condemn homosexual conduct as immoral;"[82] it subverted by sidestep the true claim of liberty in the case, which was the asserted right of homosexual persons to enter private, intimate relationships "and still retain their dignity as free persons."[83] So long as *Hardwick* remained precedent, even a precedent of lesser technical import supposing the criminalization of sodomy were held permissible only when formally imposed on heterosexuals and homosexuals alike, its existence would continue to serve in the American culture as an intolerable "invitation to subject homosexual persons to discrimination both in the public and private spheres" that "demeans the lives of homosexual persons."[84]

Preservation of the constitutional center in its pure simplicity figured no less heavily in Justice Kennedy's explication and reaffirmation of *Roe v. Wade*[85] in *Casey*. Many people construe *Roe*'s survival as a testament to the draw of stare decisis and the special institutional wages of overruling a controversial decision under fire and after a change in the Court's membership.[86] But if you reread Justice Kennedy's contributions to the joint opinion in *Casey* in light of these observations (Parts I and II of the joint opinion are Justice Kennedy's product, as are the opinion's concluding sentences[87]) you

79. *Id.* at 592.

80. 478 U.S. 186, 195–96 (1986) (denying constitutional protection to the private homosexual activity of consenting adults), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

81. *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment).

82. *Id.* at 571 (majority opinion of Kennedy, J.).

83. *See id.* at 567.

84. *Id.* at 575.

85. 410 U.S. 113 (1973).

86. *See, e.g.*, Earl M. Maltz, *Anthony Kennedy and the Jurisprudence of Respectable Conservatism*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 151–52 (Earl M. Maltz ed., 2003) (noting that the Court felt that "a total about-face on the abortion issue would undermine public confidence in the Court by making it appear that constitutional adjudication was based on nothing more than ordinary political considerations").

87. *See* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 163–64 (1995) (reporting on the Rehnquist Court's internal dynamics and attributing Parts I and II of the join opinion in *Casey* to Justice Kennedy); *see also*

should come away with a refined impression. He opened with words now famous: "Liberty finds no refuge in a jurisprudence of doubt."[88] It is the same call to faith Justice Kennedy voiced in *Texas v. Johnson*, a call for trusted absolutes and simple truths unburdened by unneeded apologetics. What followed was an effort to dispel doubt by jettisoning the troubled argot of privacy and re-presenting a woman's right to choose as a perfectly natural explication of the core liberty protected by the Constitution that owes no apologies. A woman's right to choose, Justice Kennedy explained, flows straight from "the heart of liberty"—"the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[89] It flows in a straight line that can be interrupted only by demeaning a woman's independence and subordinating her to the "compulsion of the State"[90]—an interruption that cannot be entertained without ignoring the extraordinary degree to which that compulsion would dictate "[t]he destiny of the woman" and override "her own conception of her spiritual imperatives and her place in society."[91]

To impugn the method of argument in *Lawrence* and *Casey* for its avoidance of legal doctrine, for its transcendence of rules and standards and tests devised to constrain judges, for its boldness,[92] is to miss entirely its meaning within Justice Kennedy's faith system. Articulations of constitutional liberty have to proceed this way if a constitutional center with substantive content is to endure. To circumscribe them with legal methods calculated to "curb[] the discretion of federal judges" exalts judicial restraint but cheapens the "promise of the Constitution that there is a realm of personal liberty which the government may not enter."[93] In Justice Kennedy's grand centrism, reasoning about and from that realm of personal liberty at the constitutional center is driven by an imperative of clarity for the

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TUSHNET, *supra* note 74, at 214–15 (same, and noting that the joint opinion's concluding sentences are attributable to Justice Kennedy).

88. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (opinion of O'Connor, Kennedy, and Souter, JJ.).

89. *Id.* at 851 (opinion of O'Connor, Kennedy, and Souter, JJ.).

90. *Id.* (opinion of O'Connor, Kennedy, and Souter, JJ.).

91. *Id.* at 852 (opinion of O'Connor, Kennedy, and Souter, JJ.).

92. *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (arguing that *Lawrence* "reflects a breakdown of the Court's most recent attempts to put doctrinal restraints on" substantive due process); Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1060 (2004) (expressing discomfort with *Lawrence* partly because of its "opacity[,] . . . breadth and ambition").

93. *Casey*, 505 U.S. at 847 (opinion of O'Connor, Kennedy, and Souter, JJ.).

laity rather than satisfaction of the legal professionals. That imperative starts the reasoning and also provides the principles that guide the reasoning through its intermediate steps. As Justice Kennedy practices it, reasoning from the center of shared values involves the application of what amounts to a "non-distortion" principle. Will denying a claim of liberty cloud the center with qualifications and limitations that reflect qualms about institutional roles rather than the purity of the liberty principle itself? If so, then one must be skeptical of the argument for limitation, as its acceptance (in fine and in gross) eventually will distort the center, rendering it inaccessible to the People who must fulfill their covenant of coherent succession.[94] Will denying the claim of liberty yield a picture of unequally distributed freedom, of markedly disproportionate burdens on liberty, which suggests bias has infected our rendering of the center? If so, then one must again be skeptical of the argument for limitation, and for the same reasons.[95] Will denying the claim of liberty privilege the competing interests of others that boil down to a difference of opinion about morality and its dictates? If so, then once again one must be skeptical of the argument for limitation.[96] Protected liberty must remain clear of obfuscation, accessible to all without favor, and free from the contingencies of political will and majoritarian assertions of moral differences. It is thus that a center of content remains approachable so that "persons in every generation can invoke its principles in their own search for greater freedom."[97] It

94. *See, e.g., id.* at 850–51 (counseling against allowing the state to definitively resolve the philosophical issues raised by abortion because liberty requires that women retain the right to choose); *see also* Romer v. Evans, 517 U.S. 620, 633–35 (1996) (concluding that state referendum was not intended to further legislative ends but in fact was intended to make homosexuals "unequal to everyone else," and stressing that the rarity of laws that single out a certain class for disfavor demonstrates the centrality of the equal protection principle in American society).

95. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part because "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres").

96. *See, e.g., id.* at 571 (acknowledging "powerful voices [that] condemn homosexual conduct as immoral," but asserting that those forces may not use "the power of the State to enforce those views on the whole of society through the criminal law"); *Casey*, 505 U.S. at 850 (opinion of O'Connor, Kennedy, and Souter, JJ.) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); *see also* Texas v. Johnson, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring) (acknowledging the "enormity of the offense" of flag-burning, but concluding that such acts of speech are constitutionally protected).

97. *Lawrence*, 539 U.S. at 579; *see also* Chavez v. Martinez, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part) ("It damages the law, and the

is thus that Justices retain their standing to urge its observance and enjoyment.

B. *Grand Centrism's Rhetoric*

Justice Kennedy's grand centrism hinges on the criticality of popular faith in a constitutional center. Its reasoning, structured around an imperative of clarity for the laity, serves a project of faith inculcation and maintenance. The project also is aided by distinctive rhetoric that deserves a few words here as well.

Some centrist rhetoric, probably the most common in contemporary constitutional discourse, operates to position the speaker and his or her view somewhere between two approaches that are represented as the chief alternatives having currency at the moment and each of which is marginalized as untenably extreme. Supreme Court Justices employ it often. The undue burden standard was installed into today's abortion jurisprudence with plenty of rhetorical accompaniment to that effect, for instance,[98] and Justice Kennedy and Justice O'Connor routinely use such rhetoric to present their positions on questions of national power and substantive due process as moderate because they avoid the excesses of those to the left and to the right of them on the Court.[99] Constitutional law scholars employ the rhetoric too. Mark Tushnet, for example, noted the prevalence of such rhetorical moves in Cass Sunstein's *The Partial Constitution*.[100] Grand centrism's supporting rhetoric differs. It makes no effort to promote grand centrism as a moderating compromise and does not purport to reach results that afford each side a measure of immediate satisfaction. It actually *underscores* the sacrifice that the losing side is making, holding it up as righteous and worthy of emulation. It ennobles personal sacrifice today as the fulfillment of our generation's debt to our heirs and our forebears

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vocabulary with which we impart our legal tradition from one generation to the next, to downgrade our understanding of what the Fifth Amendment requires.").

98. *See Casey*, 505 U.S. at 869–79 (opinion of O'Connor, Kennedy, and Souter, JJ.). Indeed, Justice Kennedy's dissent in *Stenberg* laments a betrayal of that rhetoric's promise. *See* Stenberg v. Carhart, 530 U.S. 914, 956–60 (2000) (Kennedy, J., dissenting).

99. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 573–80 (1995) (Kennedy, J., concurring) (assuring readers that respect for stare decisis will limit the full potential impact of the majority's decision but criticizing the more liberal approach as favoring the national government too heavily); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part) (joined by Kennedy, J.) (disavowing as overly strict Justice Scalia's approach to substantive due process, but affirming that some specificity is required in defining the rights at issue).

100. *See* Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1098–1103 (1993) (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993)).

alike.

In a move that might strike some observers as uncomfortably confessional, Justice Kennedy brings the Supreme Court Justice into the foreground as a fellow citizen who often shares the pain because he or she, too, has deeply held preferences that lose out, and whose sacrifice in service of the process of coherent succession is an act of faith (or, if you will, of civic virtue) that sets an example. Upholding the constitutional center "exacts its personal toll" on a judge, Justice Kennedy reminds us in *Texas v. Johnson*.[101] Justices often suffer in silence, but that should not be taken as evidence of unmitigated satisfaction, let alone an indication of any pleasure whatsoever in the direct consequences of the decision at hand. As Justice Kennedy explained in *Johnson*, "so great is our commitment to th[e] process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision."[102]

Yet distaste there is and, notwithstanding the foregoing disclaimer, Justice Kennedy really must want it noted because he alludes to it frequently. In *Johnson*, he proceeded to label desecration of the American flag "repellent" and spoke dismissively of the desecrator as a person who might "not even possess the ability to . . . appreciate the enormity of the offense he gave."[103] In *Casey*, he stressed that "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality."[104] In *Lawrence*, he emphasized that some persons "condemn homosexual conduct as immoral," a view which for its holders reflects "not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."[105] The point of these passages goes beyond mere cathartic hand-wringing, or the elicitation of sympathy for the judge's thankless task, or a token recognition of the interests of the losing disputants. Their rhetorical effect is to turn the depth of commitment to such views and the hardship of foregoing them into an emblem of the

101. 491 U.S. at 420 (1989) (Kennedy, J., concurring).

102. *Id.* at 421 (Kennedy, J., concurring).

103. *Id.* (Kennedy, J., concurring).

104. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

105. Lawrence v. Texas, 539 U.S. 558, 571 (2003).

constitutional center's reality and essentiality. The center and its worth are not easy to bring home to those of us who live in the here and now. Core shared values pay most of their dividends over the long haul and to society as a whole; for persons who are reasonably well-served by majoritarian politics, the benefits are experienced as a stable and relatively unthreatening background environment that is easily taken for granted.[106] The pronounced sacrifices one must make for the center in cases like *Johnson*, *Casey*, and *Lawrence*, on the other hand, provide an immediate and gripping illustration of the center's gravity. That Justices—and following their lead, citizens—are able to yield such heartfelt and weighty interests speaks to the depth of their faith in the process of coherent constitutional succession that ensures "persons in every generation can invoke its principles in their own search for greater freedom."[107] The more "painful th[e] judgment is to announce," the more it merits remembrance as a "recognition of the costs to which those beliefs commit us."[108]

One can doubt that the rhetoric does much to assuage the more committed disputants who feel the sacrifice most acutely. As opinion polls show, however, the sharp polarization we see in special-interest advocacy and much of electoral politics does not necessarily mirror the citizenry at large. There is a sizeable center out there of people whose views on such contentious questions are not so firmly fixed and who will register different and varying preferences when the questions are rephrased to broaden (or narrow) the considerations at stake.[109] It is particularly to that audience, the popular colloquial center, that grand centrism seems to be pitching the attractions of faith in a constitutional center. Whether a Supreme Court Justice can reasonably hope to have his words reach any appreciable number in that vast audience is a fair question; it is a stretch to think that his

106. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633–34 (1996) (noting that the benefits afforded by the principle of equal protection are enjoyed unconsciously and taken for granted by most persons). In noting the deep-background effect of shared values, we should not overlook the immense significance that a decision affirming shared values can have for persons living in the here and now. One need only recall the moving celebrations that met *Lawrence v. Texas* to appreciate the capacity of such a decision to liberate the spirit and kindle feelings of patriotism and community.

107. *Lawrence*, 539 U.S. at 579.

108. *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring).

109. For instance, one of the most comprehensive studies of death penalty attitudes to date demonstrates that public support for the death penalty drops precipitously when alternative punishments such as life imprisonment without the possibility of parole are available. *See* RICHARD C. DIETER, SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY (1993).

words directly reach many such persons even with the assistance of the *New York Times*, which publishes opinions in blockbuster cases like *Casey* and *Lawrence*. Yet it may well be a matter of little consequence for a grand centrist who has posited that the public's relationship to a substantive center of constitutional values can exist, must exist, and to be fostered must be treated as if it does exist. The rhetorical tools may be limited, but you use what you have.

IV. CENTRISM IN THE ABSENCE OF SHARED VALUES: JUSTICE KENNEDY'S CONCEPTUAL MODERATION

Does Justice Kennedy's grand centrism extend beyond his liberty jurisprudence to the realm of federalism, national power, and the Constitution's grand structural scheme or plan? The answer is no, but the question is profitably asked because it leads us to see how the Justice uses more than one brand of centrism to construct a distinctive centrist personam.

Justice Kennedy's approach in the federalism and national power areas is founded upon a centrist image. He invokes the vision of a center of core constitutional ideas, memorably captured in the metaphorical "atom of sovereignty" he depicted in *U.S. Term Limits, Inc. v. Thornton*.[110] The "genius" of the Framers, Justice Kennedy went on to explain there, was to split the atom and create "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[111] The split atom, then, is not to be confused with a shattered atom. To judge from Justice Kennedy's recitation in *Thornton* and in subsequent cases,[112] the Founders left us with a particle that is rather like the yin and the yang—principles that point to multiple political identities and relationships that harmoniously coexist and cohere to form a uniquely American essence.

While this certainly gestures toward something centrist, it differs from the grand centrism we just encountered. The key article of faith—popular belief in a constitutional center of shared ideas and aspirations—is missing here. The structural precepts that Justice Kennedy identifies serve freedom and foster popular self-

110. 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

111. *Id.* (Kennedy, J., concurring).

112. *See id.* (Kennedy, J., concurring); *Alden*, 527 U.S. at 713–15; City of Boerne v. Flores, 521 U.S. 507, 516–17 (1997); United States v. Lopez, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

government, but their centrality is unrelated to that. It is dictated instead by sheer force of privileged legal credentials—the Constitution's text, the understanding of the Framers, and the authoritative interpretations of judges through the years[113]—rather than any genuine or hypothesized popular adherence.[114] Justice Kennedy's grand centrism is a civic affair that imagines popular involvement in a process of constitutional development, which bonds us to the center and to one another. His federalism and national power jurisprudence is principally a top-down legal regulatory enterprise for inside players. It is the business of enforcing historically contingent structural principles against political actors who overreach their bounds expediently.[115]

If this were the extent of it, calling this dimension of Justice Kennedy's jurisprudence centrist would push the label beyond any usefulness. The mere insistence that a view is fundamental does not suffice to make the position centrist. Every fervently held view would qualify, including the countless number that no one would regard as centrist in any helpful sense of the word. Nor should an earnest claim that a view best squares with the text and original understanding be enough to make a position centrist. Even if correct, such a claim is no more centrist than textualism and originalism are centrist. Those schools of interpretation have power and command and can even pass as neutral in some circles of judgment. Those are impressive qualities, nice to have and certainly germane to the task of judicial interpretation of the Constitution. But a claim to legal authoritativeness is not the same thing as an expression of some centrist quality. The nation's once tenacious legal commitment to slavery is a case in point.

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113. *See, e.g.*, *Alden*, 527 U.S. at 713 ("[A]s the Constitution's structure, and its history, and the authoritative interpretations of this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today . . . .").

114. Justice Kennedy can wax reverentially about the Constitution's grand scheme or design, as his dissertations in *Thornton*, 514 U.S. at 838–41 (Kennedy, J., concurring), *Alden*, 527 U.S. at 713–15, *Boerne*, 521 U.S. at 535–36, and *Lopez*, 514 U.S. at 574–77 (Kennedy, J., concurring), demonstrate. But it is the reverence of the dutiful lawyer for the rules he must obey, delivered with no expectation that it will inspire faith and sacrifice.

115. *See Thornton*, 514 U.S. at 783 (striking down a state constitutional amendment that imposed term-limits on the state's congressional representatives as "inconsistent with the Framers' vision of a uniform National Legislature"); *Alden*, 527 U.S. at 712 (holding that Congress may not "subject nonconsenting states to private suits for damages in state courts"); *Boerne*, 521 U.S. at 512 (limiting Congress's section 5 power and invalidating the Religious Freedom Restoration Act as applied to the states as exceeding that power); *Lopez*, 514 U.S. at 551 (holding for the first time in nearly sixty years that an act of general application exceeded Congress's power under the Commerce Clause).

In the case of minimalist centrism, the centrist quality derives from the ambition to avert a direct engagement with conflict in the particular case or to fashion a compromise that gets us past today and on to tomorrow. The jurisprudence's centrism is positional at the case-specific level, manifested by an accommodationist posture toward the social conflict at issue. In the case of grand centrism, the centrist quality derives from the ambition to ascertain and maintain substantive values that are widely shared. The jurisprudence's centrism is manifested by its alignment with a popular intergenerational mainstream of committed beliefs. In the case of Justice Kennedy's federalism and national powers jurisprudence, it turns out that there is a discernible centrist quality as well. It derives from the ambition to be perceived as the solidly grounded and moderate conceptual alternative to the extreme frameworks represented by other positions on the Court and in contemporary constitutional culture. The jurisprudence's centrism is positional, but unlike minimalist centrism it operates at the conceptual level rather than the case-specific level. Centrism is manifested here by the fashioning of a moderate framework of harmonized principles that disavows the extremes of unbridled nationalism and state-sovereignty foundationalism alike.

We can call this iteration of centrism "conceptual moderation." Justice Kennedy establishes that centrist quality by grounding his approach to national power and state sovereignty with the holistic metaphor of the split atom and then contrasting it with the more one-sided and less balanced views he assigns to others. In *Thornton*, accordingly, Justice Kennedy criticizes his more state-sovereignty minded colleagues for extreme views that "disparage the republican character of the National Government."[116] In *Alden*, it is his more nationalist minded colleagues who are taken to task for views that equivalently "disparage . . . what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system."[117] The centrist, we are left to infer, disparages nothing. It is all about *balance* in vision, in outlook, in conceptualization, Justice Kennedy stresses in *Lopez*[118]—a balance that is jeopardized by political actors who expediently succumb to pressures from both directions and by extremist tendencies on the Court that cater too strongly to one or the other side of the scale.

116. *Thornton*, 514 U.S. at 838.
117. *Alden*, 527 U.S. at 758.
118. *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

CONCLUSION: GRAND CENTRISM AND CONCEPTUAL MODERATION JOINED—A CENTRIST PERSONAM

We could say that Justice Kennedy is a switch-hitting centrist. When shared faith cannot serve as the centering force, a more palatable, metaphorically centered and grounded framework that avoids the extremes of the competition does. (Given his ability to produce rulings that please conservatives one day and liberals the next, we also could say that Justice Kennedy can hit the ball to all fields.) It should interest us that an intelligent man who obviously has devoted much thought to these matters has chosen to invoke both of these brands of centrism to stake his ground in the areas that have proved most controversial during his years on the Supreme Court. Justice Kennedy plainly perceives himself as a centrist and wishes to be perceived as one. These are the ways he has chosen to construct a centrist judicial personam.

The coherence of that personam, to my mind, is best fathomed by appreciating the ways it engages contemporary constitutional and political culture. Note first how Justice Kennedy's two centrist tacks combine to yield a jurisprudence that is centrist in the politically immediate sense of the word. It is constitutional law's manifestation of the position occupied by the Republican "Mods" that Thomas Frank portrays in *What's the Matter with Kansas?: How Conservatives Won the Heart of America*,[119] a jaunty, left-leaning, journalistic rumination on America in these days of red states and blue states. The Mods, Frank argues, are the center in the ongoing class war that infuses American politics. Paradoxically, this class war denies the economic basis of social class and installs notions of cultural authenticity in its stead, leaving the battles to be waged between caricatured plain-spoken, God-respecting conservatives in the heartland who proclaim to be under the cultural siege of snobbish, effete, leftist elites in the coastal metropolises. As these battles roil, the Mods—with views that fall between and straddle the two caricatured camps—quietly profit while avoiding the front lines. Economically conservative corporate types, the Mods are skeptical of regulation and the capabilities and motives of an overfed federal government. On social issues, however, they are considerably more liberal than their conservative GOP compatriots—tolerant on abortion, gay rights, and matters of race; moderately separationist on

119. THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA (2004).

church-and-state issues.[120] There is much for the Mods to like in Justice Kennedy's jurisprudence. In his centrist personam, they can see a constitutional reflection of themselves.

Taking a longer view from somewhat higher ground, Justice Kennedy's centrist personam also gains strength by successfully engaging both of the two principal national narratives that vie for preeminence in our constitutional culture. One of those narratives, Lincolnian in spirit, depicts a progressive American journey to perfect individual freedom.[121] The other narrative depicts an America that returns whenever it can to a deeply rooted conservatism that distrusts government generally and national power particularly.[122] By holding out the promise of synthesizing those narratives—indeed, by stepping forward as the personification of such a synthesis—Justice Kennedy's centrist personam associates itself with a deeper cultural mainstream where strong and often conflicting currents manage to converge.

When we close back in and view Justice Kennedy's centrist personam from the tighter confines of juriscentric traditions of constitutional law, however, we can expect to hear some stiff objections. How elitist, some might say, for a jurist to cast himself as high priest. How brazen to resist lessons about judicial restraint that generations of scholarship and judicial insight have yielded. How alien to the norms of judicial interpretation of the Constitution to deemphasize doctrine and place analysis on a plane that reasons about shared values, their preservation, and their transmission. How can *this* be centrism?

The foregoing objections beg questions straight down the line. Justice Kennedy's choice to base his liberty jurisprudence on a vision of shared values seems no more elitist or subjective than another jurist's choice to side with originalism or intratextualism or the elaboration of the constitutional precedents of other jurists; indeed, it might be said to be less elitist for seeking to wrest interpretation from the exclusive clutches of legal argument and augment it with more popularly accessible discourse. Whether operating as a grand centrist in a liberty case or a conceptual moderate in a case about federalism

120. *See id.* at 102–09, 127–28.

121. For a representative recent rendition, see generally RICHARD RORTY, ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA (1998). For a recognition of the Lincolnian nature of this vision of the "thin Constitution," see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11–12 (1999).

122. For a representative recent rendition, see generally H.W. BRANDS, THE STRANGE DEATH OF AMERICAN LIBERALISM (2001).

or national power, Justice Kennedy certainly frees himself from the strictures of the tenets of judicial restraint and the interpretive postulates that seek to implement them. But that shows only that he has activist inclinations when judged by the standards of restraint. It says nothing that detracts from the *judicial* quality of his jurisprudence unless craft is wedded to restraint, a polemical claim that has been answered by many others many times.[123] It also says nothing that detracts from the *centrist* quality of his jurisprudence unless centrism is wedded to restraint. As our examination of Justice Kennedy's jurisprudence suggests, nothing dictates the necessity of such an equation. Efforts to insist on one might rightly be set aside as polemical too.[124]

In the final analysis, however, it is the conception of authority and responsibility underlying Justice Kennedy's centrist personam that provides his real answer to these objections. Although the Constitution is of, by, and for the People, history has placed Supreme Court Justices in a position of exceptional influence over its meaning. Their utterances (and their silences) significantly shape constitutional understandings, hopes, fears, and possibilities. The views of others, meanwhile, are of comparatively limited practical significance to the People, who have come to place primacy on the Court and its view. That is how it is. Alternative assignments of authority and responsibility might be contemplated but they reside, for now, in the realm of argued possibilities.[125] If you see merit in the ideal of coherent succession, in the project of carrying on in the hope of shared values, what would you ask of a Supreme Court Justice who is stationed pivotally in the system of meaning-transmission? Were a political leader to summon the center in precisely the same way as

123. For one example, see generally LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991).

124. That Justice Kennedy's centrism might abrade a lawyer's sensibilities far more than a nonlawyer's makes a certain sense, for his liberty jurisprudence is as popularly conceptualized a project as one can find on the Supreme Court these days. It makes for irony as well. The Rehnquist Court has a reputation for its predilections toward judicial supremacy. *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) (arguing that the Court "ignores the existence of political questions" in its quest for supremacy and fails to defer to elected representative bodies for similar reasons). Justice Kennedy, the author of the assertively supremacist *Boerne* decision, especially enjoys such a reputation.

125. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 5–8 (2004) (arguing that the task of constitutional interpretation should fall more to the people); TUSHNET, *supra* note 121, at 177–94 (arguing for a "populist" constitutionalism that shifts interpretive power from the courts to the people).

Justice Kennedy, using the logic and rhetoric of grand centrism, might we not hail her as a constitutional luminary with an admirable appreciation of the bonds that can be formed between the People and their Constitution through the assertion of shared values in our time and across time—a champion of the center? If in fact we would, why withhold the compliment from someone whose very job, under prevailing cultural understandings, is to provide a constitutional stewardship that very few others in the country can be expected to supply?

In answering that question, we do well to keep William Butler Yeats's words from *The Second Coming* in mind. In a world where the center fails to hold, Yeats warned," [t]he best lack all conviction, while the worst are full of passionate intensity."[126]

126. W.B. Yeats, *The Second Coming*, in THE COLLECTED POEMS OF W.B. YEATS 184–85 (18th ed. 1972).